No. 16-1140

In The
Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, d/b/a NIFLA, et al.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

This Court granted certiorari limited to the issue of:

Whether the disclosures required by the California FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

Thomas E. Montgomery, County Counsel for the County of San Diego, requests the Court to also address whether the claims against him are ripe for review under Article III of the United States Constitution. Specifically:

Is the passage of California's Reproductive FACT Act sufficient in and of itself to make the plaintiffs' First Amendment – government compelled speech – claims ripe when the plaintiffs assert they will not comply with the law and Montgomery took no steps and made no threats to enforce the law against the plaintiffs?

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INTRODUCTION

Appellants filed this lawsuit challenging the constitutionality of California's Reproductive FACT Act (Cal. Health & Saf. Code §§ 123470-123473) (FACT Act) nearly three months before the law took effect. Appellants named Thomas E. Montgomery, in his official capacity as County Counsel for the County of San Diego (Montgomery), as a defendant because the FACT Act identifies "county counsel" as among those authorized to enforce the FACT Act, and Appellant Fallbrook Pregnancy Resource Center (Fallbrook) is located within Montgomery's jurisdiction – the unincorporated area of San Diego County.

The lawsuit against Montgomery is not ripe for review under Article III of the United States Constitution because there has never been an imminent threat that Montgomery will enforce the FACT Act against Fallbrook, the only facility potentially covered by the Act in the unincorporated County of San Diego.[1] Specifically, the case is before this Court on the denial of a preliminary injunction motion which, under this Court's ripeness jurisprudence, required Fallbrook to go beyond the allegations in its complaint and offer

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[1] The FACT Act is a state law passed by the California legislature and signed into law by the Governor of California. Pet. App. 75a. Montgomery takes no position regarding the merits of lawsuit against the State challenging the FACT Act.

While Montgomery's arguments on ripeness may apply to the Attorney General and the El Cajon City Attorney, Montgomery focuses his argument on Fallbrook, the only plaintiff located within his jurisdiction.

evidence showing that its claims are ripe. Fallbrook did not meet its burden because it presented no evidence that Montgomery threatened to enforce the FACT Act against Fallbrook or took any steps to do so. Indeed, it is undisputed that Montgomery never served Fallbrook with a notice of noncompliance, which the FACT Act requires before any civil enforcement action may be filed.

The writ of certiorari should be dismissed for lack of federal jurisdiction with respect to Appellant Fallbrook and NIFLA's claims against Respondent Montgomery.

JURISDICTION

Montgomery agrees that petitioners timely requested certiorari and that 28 U.S.C. § 1254(1) authorizes this Court's review of the Ninth Circuit's decision. However, Montgomery contends that the claims against him are not ripe and therefore this Court does not have jurisdiction under Article III for the reasons addressed in the Argument.

Montgomery raised ripeness below.[2] Pet. App. 50a-55a; J.A. 114; *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 823-833 (9th Cir. 2016). Without

[2] In any event, ripeness may be raised at any time, even for the first time at the Supreme Court. *Renne v. Geary*, 501 U.S. 312, 315, 111 S. Ct. 2331, 2336 (1991) (cert. granted to determine whether provision in Cal. Const. violated First Amendment; doubts about justiciability raised at oral argument).

making any distinction between the three plaintiffs or the three defendants, the lower courts concluded that the case was ripe, even though the litigation was commenced prior to the January 1, 2016 effective date of the FACT Act and even though plaintiffs submitted no evidence that any defendant took steps or made threats to enforce the law after it went into effect. *Ibid.*; and see Cal. Stats. 2015, ch. 700, § 3 (Assem. Bill No. 775) (2015-2016 Reg. Sess.); Cal. Const. art. IV, § 8(c)(1).

STATEMENT OF THE CASE

A. Factual background.

The FACT Act was signed by California Governor Jerry Brown on October 9, 2015. Pet. App. 75a; Cal. Stats. 2015, ch. 700, § 3 (2015-2016 Reg. Sess.) (Assem. Bill No. 775).[3] Under California law, the FACT Act did not take effect until January 1, 2016. Cal. Const. art. IV, § 8(c)(1).

Beginning on January 1, 2016, the FACT Act required licensed medical pregnancy centers, such as plaintiff Pregnancy Care Clinic, to post or distribute a notice stating that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal

[3] Accessible at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB775.

care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." Pet. App. 80a, at new Cal. Health & Saf. Code § 123472(a)(1). Three options were available for dissemination of the notice. Pet. App. 80a-81a, new Cal. Health & Saf. Code § 123472(a)(2)(A)-(C). The notice could also be combined with any other mandated disclosures. *Id.*, new Cal. Health & Saf. Code § 123472(a)(3).

Starting on January 1, 2016, the FACT Act required unlicensed non-medical pregnancy centers, referred to as an "unlicensed covered facility," to post a notice stating that "[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." Pet. App. 79a and 81a, new Cal. Health & Saf. Code § 123471(b) [definition and factors for "unlicensed covered facility"] and § 123472(b)(1) [required notice]. The FACT Act required inclusion of this notice in any advertising material distributed by unlicensed covered facilities. *Id.* at § 123472(b)(3). Appellant Fallbrook, alleged it "is not licensed by the State of California" and "may qualify as an 'unlicensed covered facility'" under the FACT Act. Pet. App. 100a, 103a (Complaint, ¶¶ 83, 107).

The FACT Act solely authorized civil penalties – not criminal sanctions. Pet. App. 82a, new Cal. Health & Saf. Code § 123473(a)(1)-(2). Even then, there is no immediate threat that civil penalties will be imposed for violating the FACT Act because it provides a safe harbor provision requiring notice and an opportunity

to comply before any civil action may be filed. Specifically, the FACT Act requires the Attorney General, city attorney or county counsel to first "[p]rovide [ ] the covered facility with reasonable notice of noncompliance, which informs the facility that it is subject to a civil penalty if it does not correct the violation within 30 days from the date the notice is sent to the facility" and a civil action cannot be commenced until after the noticing authority verifies "that the violation was not corrected within the 30-day period described" above. Pet. App. 82a, new Cal. Health & Saf. Code § 123473(a)(1)-(2).

The FACT Act gives the California Attorney General authority to enforce the FACT Act throughout California. Pet. App. 82a, new Cal. Health & Saf. Code § 123473(a). It also authorizes a city attorney or county counsel to enforce the FACT Act within their respective jurisdictions. The FACT Act, however, does not mandate that a county counsel enforce the FACT Act. *Ibid.*

On October 13, 2015 – nearly three months before the FACT Act took effect – National Institute of Family and Life Advocates, d.b.a. NIFLA (NIFLA), Pregnancy Care Center, d/b/a. Pregnancy Care Clinic, and Fallbrook filed their Complaint against Montgomery, the Attorney General and the El Cajon City Attorney under 42 U.S.C. § 1983. J.A. 1 (Doc. 1), Pet. App. 84a-85a.

NIFLA is a "national non-profit pro-life membership organization with 111 affiliates in California."

Pet. App. 85a-86a (Complaint, ¶ 2). Although NIFLA generally alleged two of its affiliate members are located in San Diego County (Pet. App. 85a-86a [Complaint, ¶ 2]), the specific fact allegations establish only one affiliate, Appellant Fallbrook, is located in the unincorporated County of San Diego, and thus within Montgomery's jurisdiction.

Fallbrook alleges it "may" qualify as an "unlicensed" facility within the meaning of the FACT Act and is located in the unincorporated Fallbrook area of the County of San Diego. *Id.*, at 89a-90a, 103a (Complaint, ¶¶ 22, 107).

The third plaintiff, Pregnancy Care Center, alleges it is a "licensed" facility within the meaning of the FACT Act and is located in the incorporated City of El Cajon. *Id.*, at 89a-91a (Complaint, ¶¶ 20, 25, 30). Pregnancy Care Center is therefore located within the jurisdiction of the El Cajon City Attorney. *Ibid.*

B. Pertinent procedural history.

The Complaint sought to have the court declare the FACT Act unconstitutional and to enjoin the defendants from enforcing it. Pet. App. 120a (Complaint, Prayer ¶¶ A and B). The three plaintiffs alleged as pertinent to the issue on certiorari:

- The required disclosure statements constitute compelled speech in violation of the free speech clause of the First Amendment. Pet. App. 109a-110a, 117a-118a (Complaint, ¶¶ 150-153, 199-204).

On October 21, 2015, NIFLA, Fallbrook and Pregnancy Care Center filed a motion for preliminary injunction. J.A. 2 (Doc. 3). As noted by the district court, no declarations were submitted in support of the motion. Pet. App. 47a at n. 2. Instead, the plaintiffs relied on the allegations in the verified complaint. *Ibid.*

The Attorney General, Montgomery and the El Cajon City Attorney opposed the preliminary injunction motion on jurisdictional grounds, namely ripeness. J.A. 3-4 (Docs. 21-23); Pet. App. 50a-55a. The Attorney General's opposition also opposed the motion on the merits. *Ibid.*

The district court heard oral argument on the motion for preliminary injunction in January of 2016, *after* the FACT Act took effect. *Id.*, at 8 (Doc. 45); Pet. App. 44a-45a. Fallbrook presented no evidence that Montgomery commenced a civil enforcement action against it or even threatened to do so. See J.A. 5 (Doc. 30). Indeed, there was no evidence that Montgomery issued a notice of noncompliance against Fallbrook. Neither was there any evidence that either the California Attorney General or the El Cajon City Attorney issued notices of noncompliance against any of the other plaintiffs.

In its subsequent Order denying the preliminary injunction motion, the district court rejected the ripeness arguments. Pet. App. 50a-55a. It applied the factors used by the Ninth Circuit in *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) (*Thomas*), as well as the Ninth

Circuit's requirement that the plaintiff "articulate a concrete plan to engage in conduct subject to the law" announced in *Lopez v. Candaele*, 630 F.3d 775, 787 (9th Cir. 2010), but recognized Ninth Circuit authority holding that a plaintiff need not risk prosecution where protected speech may be at risk. Pet. App. 51a-52a. The district court concluded "the Plaintiffs present a concrete plan to violate the [A]ct" based on the complaint allegations that they desire to not "utter the disclosures required by the FACT Act." Pet. App. 55a.

The district court acknowledged "no one has threatened to institute enforcement proceedings against Plaintiffs for their failure to comply with the [FACT] Act." Pet. App. 55a. Nevertheless it inferred that there was a "credible threat of prosecution" since none of the defendants affirmatively stated the FACT Act would not be enforced. *Ibid.*

At the Ninth Circuit, Montgomery again argued that the claims against him were not ripe for review. Pet. App. 13a. The Ninth Circuit found the claims were constitutionally ripe and prudentially ripe without addressing ripeness in relation to any specific plaintiff or defendant. *Id.*, at 13a-17a.

The Ninth Circuit applied its en banc *Thomas* decision which quoted from this Court's decision in *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93, 65 S. Ct. 1483, 1487 (1945) in arriving at three factors the Ninth Circuit assesses in deciding whether a case is constitutionally ripe – "(1) whether plaintiffs have articulated a concrete plan to violate the statute in question;

(2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (3) the history of past prosecution or enforcement of the challenged statute." Pet. App. 14a. The Ninth Circuit recognized that where these factors are satisfied, a pre-enforcement challenge to a law claimed as infringing on fundamental rights is ripe for review. *Ibid.*, citing to *Thomas, supra*, 220 F.3d at 1137, n. 1 and *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (holding booksellers had pre-enforcement standing to challenge Virginia law making it a crime "to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse" obscene materials, and which required booksellers implement substantial changes to avoid violating the law).

The Ninth Circuit concluded that the plaintiffs' allegation that they intended to not comply with the FACT Act was sufficient to satisfy the first prong of the test requiring a concrete plan to violate the statute. Pet. App. 14a. The Ninth Circuit reasoned, in the negative, that the second prong was satisfied because the Attorney General "has not stated that she will not enforce the FACT Act." *Id.*, at 14a-15a. As to the third prong, the Ninth Circuit held that the absence of a history of prosecution or enforcement was not compelling because the FACT Act did not go in effect until approximately one month before the district court denied the motion. *Id.*, at 15a, citing to *Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010) and *LSO Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000). On the third prong,

the panel indicated in a footnote that it received NIFLA's Fed. R. Civ. P. 28(j) letter informing the panel that the Los Angeles City Attorney purportedly sent an August 16, 2016 notice of noncompliance to a NIFLA affiliate located outside San Diego County. Pet. App. 15a, n. 4. Fallbrook did not submit a letter or other proof indicating that Montgomery issued any notice of noncompliance or otherwise threatened to enforce the FACT Act against Fallbrook. *Ibid.*

The Ninth Circuit then evaluated prudential ripeness. It utilized the considerations formulated in *Thomas, supra* – "(1) the fitness of the issues for judicial decision and; (2) hardship to the parties if we were to withhold jurisdiction." Pet. App. 16a.

On the first prong, the panel concluded the "action turns on a question of law" which required no further factual development. Pet. App. 16a. On the hardship prong, the panel acknowledged that under Ninth Circuit precedent the court considers "whether the 'regulation requires an immediate and significant change in plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." *Ibid.* The panel concluded the choice of compliance with the FACT Act versus the plaintiffs' expressed desire to do nothing and thus violate the law was a sufficient hardship. *Id.*, at 17a. The court also concluded that all parties would suffer hardship in relation to potential future enforcement actions without the benefit of a ruling on constitutionality of the FACT Act. *Ibid.*

The Ninth Circuit proceeded to affirm denial of the preliminary injunction motion, upholding the validity of the FACT Act. Pet. App. 17a-42a.

The petition for certiorari to this Court followed. This Court granted certiorari, limiting the issue on review to whether the disclosures required by the FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

SUMMARY OF ARGUMENT

This "pre-enforcement" challenge is premature and not ripe for review. This lawsuit was filed prior to the FACT Act taking effect, and thus before enforcement of the law was even possible. Moreover, Montgomery did not threaten to enforce the FACT Act against Fallbrook once the law took effect or take any steps toward that end.

At no time did Fallbrook present any evidence showing that Montgomery gave the required notice of noncompliance or otherwise threatened to enforce the FACT Act against Fallbrook. It is undisputed that to this day, Montgomery has not issued a notice of noncompliance to Fallbrook or otherwise threatened to enforce the FACT Act against it.

Since Fallbrook is the only NIFLA affiliate within Montgomery's jurisdiction, NIFLA's claims against Montgomery are likewise not ripe. NIFLA has no

independent basis to assert any claims or establish jurisdiction, other than through its affiliate, Fallbrook.

The claims against Montgomery are simply not ripe for review. Thus, certiorari should be dismissed as to Fallbrook's and NIFLA's claims against Montgomery.

ARGUMENT

I. THE CLAIMS ARE NOT RIPE AGAINST MONTGOMERY.

Fallbrook's claims against Montgomery are not ripe for review because there is no imminent threat that Montgomery will enforce the FACT Act against Fallbrook. Montgomery has not issued a notice of noncompliance, a prerequisite to filing an action seeking civil penalties under the law. Montgomery has made no statements or taken any action indicating that he plans to enforce the FACT Act against Fallbrook.

"A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300, 118 S. Ct. 1257, 1259 (1998), quoting from *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581, 87 L.Ed.2d 409, 105 S. Ct. 3325 (1985) (quoting 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3532, p. 112 (1984)).

This Court recently observed that in pre-enforcement situations, "[o]ne recurring issue in our cases is determining when the threatened enforcement of a law creates an Article III injury." *Susan B. Anthony List v. Driehaus*, ___ U.S. ___, 134 S. Ct. 2334, 2342, 189 L.Ed.2d 246, 255 (2014). Where a statute has not taken effect when the lawsuit is filed, there is no history of enforcement, no pending enforcement and no actual threat of enforcement against a specific plaintiff, this Court should find that the case is unripe as to that particular plaintiff.

A. This Court's jurisprudence on ripeness in pre-enforcement cases.

In *Younger v. Harris*, 401 U.S. 37, 42, 91 S. Ct. 746, 748 (1971) (*Younger*), this Court conducted a plaintiff-specific assessment and found that claims by three of the named plaintiffs were not ripe where there was no threatened prosecution as to those plaintiffs. The Court reasoned as follows:

> If these three had alleged that they would be prosecuted for the conduct they planned to engage in, and if the District Court had found this allegation to be true – either on the admission of the State's district attorney or on any other evidence – then a genuine controversy might be said to exist. But here appellees Dan, Hirsch, and Broslawsky do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible.

> They claim the right to bring this suit solely because, in the language of their complaint, they "feel inhibited."

Younger, 401 U.S. at 42.

The result in *Younger* was distinguished in *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 1215 (1974) (questioned on other grounds in *MTM, Inc. v. Baxley*, 420 U.S. 799, 807 n. 2, 95 S. Ct. 1278, 1283 (1975) (White, J., concurring)). The difference – the plaintiff in *Steffel* was twice warned to stop handbilling and the police told him he would be arrested if he handbilled at the shopping center again in disobedience of a warning to stop. *Steffel*, 415 U.S. at 459. The conclusion it was likely he would be prosecuted was further supported by the arrest of his companion for the same offense. *Ibid.* "In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Ibid.* Thus *Steffel* involved "alleged threats of prosecution that [could not] be characterized as 'imaginary or speculative' " but the case was still remanded for a determination of whether there remained a continuing controversy. *Ibid.*

In 2014, this Court confirmed in *Susan B. Anthony List v. Driehaus*, that "we have permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent." *Susan B. Anthony List, supra*, 134 S. Ct. at 2342. "Specifically, we have held that a plaintiff satisfies the

injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Ibid.*, quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L.Ed.2d 895 (1979) (finding challenge to law proscribing dishonest, untruthful and deceptive publicity by plaintiffs who actively engaged in and alleged an intent to continue consumer publicity campaigns in the future to be ripe).

The *Susan B. Anthony List* case involved SBA's challenge to an Ohio statute prohibiting false statements during the course of a campaign where a candidate lodged a complaint with the Ohio Elections Commission which found probable cause and setthe matter for full hearing. *Susan B. Anthony List*, *supra*, 134 S. Ct. at 2339. SBA filed suit in federal court prior to the full hearing. *Ibid.* SBA sought declaratory and injunctive relief and challenged the statute on First and Fourteenth Amendment grounds. The plaintiff's federal complaint was later amended to allege a continuing threat of prosecution in relation to future campaigns after the Ohio Election Commission proceedings were terminated due to the candidate's withdrawal of his complaint against SBA. *Id.*, at 2340. With the existence of a prior state proceeding against SBA, evidence showing 20-80 complaints to the state elections commission each year, and SBA's stated intent to continue its activities, this Court had no difficulty concluding there existed a continued threat of a future

complaint against SBA, making the claims ripe. *Id.*, at 2343-2346.

In *Harris v. Quinn*, 134 S. Ct. 2618, 2644 n. 30, 189 L.Ed.2d 620, 659 (2014), this Court addressed First Amendment associational freedom claims of personal assistants working under Illinois's Rehabilitation Program which required payment of union dues from non-union members. In footnote 30, the majority concluded similar workers in the related "Disabilities Program" were not ripe even though potentially subject to the Illinois law because those personal assistants had not yet unionized. *Ibid.* As with *Younger*, the Court concluded that ripeness must be separately evaluated as to each plaintiff.

B. This case has not been ripe at any stage of the proceedings.

The plaintiffs admit that they filed the Complaint approximately three months before the FACT Act took effect. Pet. App. 88a (Complaint, ¶ 13). The case was not ripe when the Complaint was filed because none of the defendants could enforce a law that was not yet in effect. As to Fallbrook, the one plaintiff within Montgomery's jurisdiction, the Complaint contained no allegations that Montgomery threatened to enforce the FACT Act upon its effective date or made any public statements indicating such an intent. *Id.*, at 100a-103a (Complaint, ¶¶ 82-112). Nor were there any allegations Montgomery took a position on whether

Fallbrook was an "unlicensed covered facility" within the meaning of the FACT Act.

The FACT Act's provision requiring a notice of noncompliance and opportunity to comply before any civil action could be brought against Fallbrook takes this case out of the rare instance where this Court found a pre-effective date, pre-enforcement lawsuit to be ripe. In *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 536, 45 S. Ct. 571, 574 (1925), this Court found a challenge to an Oregon law ripe where, upon taking effect, the law required all children, except those expressly exempted, attend public school upon pain of criminal liability. In addition to impending criminal liability, the statute would have immediately impacted constitutional rights over parental choice of child education and would cause imminent harm to the plaintiffs – private schools – who would lose business as soon as the law took effect. *Pierce v. Soc'y of Sisters*, 268 U.S. at 536. This Court reasoned the "injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable."

That is not the situation here. The plaintiffs stated their intent not to comply with the FACT Act once it took effect. *Id.*, at 105a (Complaint, ¶ 123). They then made the conclusory allegation of "a credible threat of adverse state action due to the FACT Act." *Id.*, at 106a (Complaint, ¶ 130). Those bare allegations could not establish a credible threat of prosecution at the time the Complaint was filed. The FACT Act was not yet

effective and therefore the plaintiffs were not required to comply with the law. Neither could they show that they would incur any expense once the FACT Act took effect because they made it clear they were not going to give any notices required by the law. Further, unlike the prospect of immediate criminal liability in *Pierce v. Soc'y of Sisters*, the FACT Act requires Montgomery to issue a notice of noncompliance and give Fallbrook an opportunity to correct the violation before he could bring a civil action against Fallbrook.

For these reasons, Fallbrook's claims against Montgomery were not ripe at the time the Complaint was filed. Neither were Fallbrook's claims ripe at the time the district court heard oral argument on the motion for preliminary injunction, which took place after the effective date of the FACT Act.

We presume that federal courts lack jurisdiction "unless 'the contrary appears affirmatively from the record.'" *Renne v. Geary*, 501 U.S. 312, 316, 111 S. Ct. 2331, 2336 (1991). Thus, each element supporting federal jurisdiction, including ripeness, must exist at each stage of the case and must "be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Susan B. Anthony List*, 134 S. Ct. at 2342, quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137 (1992).

Under this Court's decisions in *Susan B. Anthony List*, 134 S. Ct. at 2342 and *Lujan*, 504 U.S. at 561,

Fallbrook was required to submit evidence establishing that the court has subject matter jurisdiction under Article III. Fallbrook submitted no evidence in support of its motion for a preliminary injunction showing that it received a notice of noncompliance from Montgomery. See Pet. App. 47a at n. 2 (district court confirmation that plaintiffs submitted no declarations in support of preliminary injunction motion). Likewise, Fallbrook submitted no evidence that Montgomery had ever stated that he planned to issue a notice of noncompliance or otherwise take any steps to enforce the FACT Act in the future. *Ibid.*

The only "fact" Fallbrook relied on was the mere existence of the statute itself and the provision identifying county counsel as one of the officials who had authority to bring a civil action after the issuance of a notice of noncompliance and after the failure to take corrective action. That is not sufficient to establish an imminent threat of harm necessary to make Fallbrook's claims ripe.

This case is governed by the holding in *Renne v. Geary*, 501 U.S. 312, 322, 111 S. Ct. 2331, 2339 (1991), where this Court concluded that ripeness did not exist in the absence of any past enforcement of the statute or indication of intent to enforce. The *Renne* Court dismissed on standing and ripeness grounds political parties' challenge to a California statute prohibiting candidate endorsements in ballot pamphlet statements, reasoning in part that the statute carried no criminal penalties and could only be enforced through injunction, and nothing "in the record suggests that

petitioners have threatened to seek an injunction against county committees or their members if they violate § 6(b)." *Renne v. Geary*, 501 U.S. at 322.

The absence of ripeness is also supported by the holding in *Younger* where this Court found three of the plaintiffs' claims were not ripe where there was no threatened prosecution against the specific plaintiff. *Younger*, 401 U.S. at 42. Likewise, Fallbrook offered no evidence showing that Montgomery took any action or made any threats to enforce the FACT Act at any time. Fallbrook's belated attempt to overcome that failing through its Fed. R. App. 28(j) letter informing the Ninth Circuit panel that the Los Angeles City Attorney purportedly sent a noncompliance notice to a different NIFLA affiliate located outside San Diego County is unavailing. See J.A. 18 (Docs. 49-51); Pet. App. 15a at n. 4. As in *Younger*, the fact that one person showed threatened enforcement sufficient to demonstrate ripeness did not mean the claims of others who were never threatened with enforcement became ripe. *Younger*, 401 U.S. at 42.

Now, Fallbrook will likely counter that the customary ripeness analysis is relaxed when facial challenges implicating First Amendment protections are brought. See *Babbitt*, *supra*, 442 U.S. at 298-299, 301-303 (applying ripeness determination on a claim by claim basis and finding three of five claims ripe where evidence of past prosecution under related acts was presented and criminal penalties applied). While the standard may be relaxed, this Court ultimately requires a showing of (1) explicit criminal penalties that the plaintiff

faces upon violation, (2) the loss of a vested license, or (3) a specific chilling effect on demonstrably intended future speech, combined with evidence showing past enforcement or evidence showing the state took steps to enforce the statute. See also *Doe v. Bolton*, 410 U.S. 179, 188-189, 93 S. Ct. 739, 746 (1973) (ripeness found where evidence presented showing criminal enforcement of predecessor Georgia abortion act as indicative of imminent threat of future prosecution). Ultimately, however, these cases are inapplicable here because Fallbrook never offered any evidence that Montgomery threatened to enforce the FACT Act or took any steps to do so.

Also, unlike traditional pre-enforcement "chilled speech" cases where the plaintiff established the challenged statute caused the plaintiff to self-censor by not engaging in free speech activities because of a threat of potential enforcement, there is no such "chilling effect" present in this case. Fallbrook avowed it would not comply with the FACT Act's unlicensed facility notice and NIFLA made a similar statement related to its non-licensed members. *Id.*, at 98a-100a, 105a (Complaint, ¶¶ 72-82, 119-125). That is enough to show Fallbrook's claims and any claims by NIFLA are unripe as against Montgomery.

An order dismissing this case for lack of jurisdiction under Article III would not impose any burden on Fallbrook's speech. Unlike a criminal statute which exposes a plaintiff to a real threat of immediate criminal liability, only civil penalties can be imposed for violating the FACT Act and the law requires a notice of

noncompliance and an opportunity to comply before any civil enforcement action can be brought. See Pet. App. 82a, Cal. Health & Saf. Code § 123473(a)(1)-(2). Should Fallbrook ever receive a notice of noncompliance, it would have ample time to seek injunctive relief well before any civil penalty could be imposed against it.

Nor does this case fall within the class of cases finding pre-enforcement ripeness where the law would inevitably cause economic harm. See, e.g., *Pennsylvania v. West Virginia*, 262 U.S. 553, 592-593, 43 S. Ct. 658, 663 (1923) (suit to enjoin West Virginia act found ripe even though implementing agency had not yet acted where implementation would cause immediate injury to plaintiff states and their consumers in the range of hundreds of millions of dollars); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. at 393 (booksellers exposed to imminent criminal liability and booksellers would incur extensive costs and business disruption implementing substantial changes to avoid violating the law).

Fallbrook faced no additional costs as a result of the FACT Act since it asserted in the Complaint that it would not provide the notices required by the law. Nor did Fallbrook identify how the FACT Act prevented, interfered with, or otherwise chilled its pregnancy counseling activities and related messages, especially since it had no intent to comply with the FACT Act.

This Court should dismiss Fallbrook's claims because they are not constitutionally ripe for review.

II. FALLBROOK'S CLAIMS ARE ALSO NOT PRUDENTIALLY RIPE.

Alternatively, the Court should exercise its discretion to find the case not prudentially ripe for review. Fallbrook's claims would substantially benefit from further factual development and Fallbrook will suffer no harm should the Court decline to exercise jurisdiction over this case.

Under the prudential ripeness doctrine, federal courts consider both "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration" in determining whether review of the issue should be declined for prudential reasons in favor of awaiting a more fact specific, concrete dispute. *National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 808, 123 S. Ct. 2026, 155 L.Ed.2d 1017 (2003), accord, *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n. 2, 130 S. Ct. 1758, 1767 (2010).

A. Fallbrook's claims would be substantially aided by further factual development.

Further factual development was and is necessary to facilitate court review of Fallbrook's legal claims against Montgomery. Thus, the Court should decline to

exercise jurisdiction over Fallbrook's claims at this time.

To be fit for judicial consideration, the Court takes into account whether further factual development would "significantly advance our ability to deal with the legal issues presented." *Nat'l Park Hosp. Ass'n v. DOI*, 538 U.S. 803, 812, 123 S. Ct. 2026, 2032 (2003). Or, as the Ninth Circuit described the factors in *Thomas*, "'[a] concrete factual situation is necessary to delineate the boundaries of what conduct the government may or may not regulate'" and that constitutional issues should not be decided in a vacuum. *Thomas*, 220 F.3d at 1141 (citation omitted).

Fallbrook's own allegations questioned whether it would even fall under the FACT Act's "unlicensed covered facility" provisions. See Pet. App. 100a, 103a (Complaint, ¶ 82 ["Fallbrook, and NIFLA's non-medical pregnancy center members in California, *appear* to qualify as unlicensed covered facilities for purposes of the FACT Act" [emphasis added]], ¶ 109 [questioning whether Fallbrook might qualify as an unlicensed covered facility due to asserted vagueness]. Fallbrook also identified various forms of pregnancy related information it provides for services rendered by others and questioned whether such information might fall under the FACT Act. See Pet. App. 102a-103a (Complaint, ¶¶ 96-106). Waiting for a notice of noncompliance under the FACT Act, if any ever came, would provide a court with specific alleged facts showing how (1) Fallbrook fell within the FACT Act's requirements, and (2) violated the FACT Act.

Requiring further factual development is particularly important here because Fallbrook raises an as-applied, not facial challenge, to the FACT Act. "An as-applied challenge goes to the nature of the application rather than the nature of the law itself." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803, 104 S. Ct. 2118, 2127 (1984); *Desert Outdoor Advertising, Inc. v. City of Oakland*, 506 F.3d 798, 805 (9th Cir. 2007).

Fallbrook's preliminary injunction papers aptly demonstrate the large number of factual issues raised in Fallbrook's challenge to the FACT Act, making plain it raises an as-applied challenge even though the FACT Act has not been applied to it. According to Fallbrook, "[t]he Act requires unlicensed non-medical pregnancy centers, such as Plaintiff Fallbrook and similar NIFLA members, to place in all 'digital' advertisements and post within their facilities disclosures telling women they have no medical licenses, even though those centers need no medical licenses since they are not offering medical services (and don't pretend to)." Addendum at 3a (Doc. 3 at 9). The factual issues raised by Fallbrook include whether Fallbrook: (1) engages in "digital" advertising covered by the FACT Act, (2) offers medical services to the public even though it claims not to, and (3) implies to others that it offers medical services. *Ibid.*; and see Pet. App. 100a-103a (Complaint, ¶¶ 83-106).

Fallbrook also asserted in the preliminary injunction motion that "[u]nlicensed centers, in turn, must clutter or preclude their advertising altogether due to

posting the long and prominent disclaimers." Addendum at 3a (Doc. 3 at 9). This raises the obvious factual question of whether the required statement ["This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services"], will preclude Fallbrook from advertising its services or will require it to unnecessarily "clutter" its advertisements. See Pet. App. 81a, Cal. Health & Saf. Code § 123472(b)(1).

Fallbrook asserts that the required disclosure "strongly suggests that Plaintiffs are unqualified to provide their information because they are not licensed physicians. . . . They are fully competent to share their viewpoint and personal help to women to aid them in choosing better options than abortion." Addendum at 4a (Doc. 3 at 10). This assertion raises the factual question of whether women who receive the required statement believe that the employees of Fallbrook are unqualified to provide information about reproductive health issues. Moreover, how would the notice purportedly result in an adverse impact to Fallbrook's desired message rising to the level of a constitutional violation? As this Court previously observed, "to say the ordinance presents a First Amendment *issue* is not necessarily to say that it constitutes a First Amendment *violation.*" *Members of City Council v. Taxpayers for Vincent*, 466 U.S. at 803-804 (internal citation omitted). Absent factual development in the form of specific allegations that Fallbrook is covered under the unlicensed covered facility provisions

of the FACT Act and the specific purported violations, Fallbrook's claims are not ripe.

B. The notice provisions of the FACT Act mean that Fallbrook will not be harmed if its claims are found unripe.

Fallbrook will not be harmed if the Court declines to exercise jurisdiction over the claims because Fallbrook admits that it is not complying with the FACT Act and it will have ample time to file a lawsuit and seek injunctive relief if it ever receives a notice of noncompliance outlining the basis of any asserted noncompliance.

Fallbrook's expressed uncertainty regarding whether the FACT Act applies to its activities makes this case akin to *Renne v. Geary*, 501 U.S. at 323. In *Renne*, this Court found no harm in declining to exercise jurisdiction because it was not clear from the statute whether it would apply to the plaintiff. *Ibid.* This Court also noted the potential that the challenged provisions could be interpreted, and possibly invalidated, by the state courts which supported declining federal jurisdiction. *Ibid.*

This Court's past decisions finding hardship are inapplicable here, especially in light of the FACT Act's noncompliance notice requirement. *Nat'l Park Hosp. Ass'n v. DOI*, 538 U.S. 803, 809-810, 123 S. Ct. 2026, 2031 (2003) found hardship existed in advance of actual enforcement where the statute or regulation threatened the plaintiff's licensed status if it failed to

perform acts or refrain from acts. Fallbrook faces no such license revocation threat. *Abbott Labs. v. Gardner* found hardship where drug manufacturers *who desired to comply with new labeling regulations* faced potential criminal misbranding charges even if they undertook the enormous expense of destroying existing labeling and retooled to change their labels, advertisements, and promotional materials in the event the FDA determined their new labels did not comply. *Abbott Labs. v. Gardner*, 387 U.S. 136, 152-153, 87 S. Ct. 1507, 1517-1518 (1967) (superseded by statute on other grounds). Nor is this case akin to the First Amendment challenge in *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. at 391-393 where this Court found that the evidence presented showed hardship because the booksellers faced significant costs to comply with the statute, an imminent threat of criminal prosecution if they did not adequately comply, and a demonstrated potential of self-censorship in seeking to comply with the new law.

Here, Fallbrook would suffer no hardship if the Court declined to exercise jurisdiction over this case. Fallbrook expressly asserted that it would proceed with business as usual and not give the unlicensed covered facility notice. Pet. App. 105a (Complaint, ¶¶ 122-124). It said, "Plaintiff Facilities desire to continue engaging in their speech and expressive services while refusing to post, distribute, or otherwise communicate the required compelled statements." *Ibid.* (Complaint, ¶ 124).

Fallbrook faces no imminent consequences (financial or otherwise) because of the FACT Act. This is true because Montgomery has never issued a notice of noncompliance to Fallbrook. Any possible threat of a civil action and potential civil penalties remain contingent on issuance of the requisite notice. Much like the conclusion reached in *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164-165, 87 S. Ct. 1520, 1525 (1967), there is no harm in awaiting issuance of a noncompliance notice which would give Fallbrook plenty of time to seek judicial review before any civil action or civil penalty could ever be imposed against it.

Hardship is also eliminated by the grace period provided by the FACT Act following a noncompliance notice. The FACT Act expressly provides that a "notice of noncompliance" must be given and that a minimum of 30 days must pass before verification of continued noncompliance. Pet. App. 82a at Cal. Health & Saf. Code § 123473(a)(1) and (2). Only if noncompliance continues 30 days after the notice may a civil action be pursued. *Ibid.* So, none of the named defendants, including Montgomery, could bring a civil action *until 31 days after the issuance of the notice of noncompliance, at the earliest. Ibid.*

Accordingly, Fallbrook would not have to wait for a civil proceeding to be filed against it before its claim became ripe. Rather, the claims would ripen as soon as notice of noncompliance outlining the alleged basis of the violation was given as required by the FACT Act. The 31 day safe harbor provision in turn, gives Fallbrook and any entity served with a notice of

noncompliance sufficient time to file a lawsuit and seek a temporary restraining order or preliminary injunction enjoining the FACT Act as applied.

Any potential hardship is further mitigated by the fact that only civil penalties may be imposed for violating the FACT Act. This "possible financial loss" does not meet the hardship requirement.[4] *California, Dep't of Education v. Bennett*, 833 F.2d 827, 834 (9th Cir. 1987) (financial expense alone was insufficient hardship to justify pre-enforcement judicial review); and see *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164-165, 87 S. Ct. 1520, 1525 (1967) (no hardship – regulation did not impact primary conduct; no immediate consequence for failure to comply and adequate opportunity for judicial review).

Indeed, any potential of a future enforcement action against Fallbrook remains speculative because the FACT Act does not mandate county counsel enforce the law. It merely identifies county counsel as one of the persons who *may* serve a noncompliance notice and thereafter enforce the FACT Act following expiration of the safe harbor period. See Pet. App. 82a, Cal. Health & Saf. Code § 123473(a).

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[4] At the district court, plaintiffs argued that they run the risk of "prosecution" if this pre-enforcement challenge is not decided. This is untrue on two grounds. First, a defendant cannot be criminally prosecuted for violating the FACT Act – only civil penalties may be imposed. Second, plaintiffs can seek injunctive relief after a notice of noncompliance and well before any potential civil penalty might be awarded.

For these reasons, Fallbrook will not suffer any hardship if the Court declines to exercise jurisdiction over this case under the prudential ripeness doctrine.

CONCLUSION

Montgomery requests this Court find Fallbrook and NIFLA's claims against him not ripe and therefore this Court lacks subject matter jurisdiction under Article III of the United States Constitution. Alternatively, the Court should find that Fallbrook's claims are not ripe for review under the prudential ripeness doctrine.[6]

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[6] NIFLA's claims are derivative of Fallbrook's claims against Montgomery and fail for the same reasons. Pregnancy Care Center is located in the City of El Cajon and its claims are against the City Attorney, not Montgomery.